

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAMES EDWARD SCOTT, III,
Plaintiff

FRENANDEIS A. FRAZIER, et al.,
Defendants

Case No.: 3:23-cv-00251-MMD-CSD

Report & Recommendation of United States Magistrate Judge

Re: ECF No. 35

9 This Report and Recommendation is made to the Honorable Miranda M. Du, United
10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
11 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Before the court is a motion for summary judgment filed by the defendants in this action.
13 (ECF Nos. 35, 37.) Plaintiff filed an opposition. (ECF No. 41.) Defendants have replied. (ECF
14 No. 42.)

I. BACKGROUND

Plaintiff is an inmate in custody of the Nevada Department of Corrections (NDOC). He filed a *pro se* civil rights complaint, which the court screened and allowed to proceed on a claim of Eighth Amendment deliberate indifference and violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, and the Rehabilitation Act (“RA”), 29 U.S.C. § 794(a). (ECF No. 4.)

21 The complaint alleges as follows: For at least nine months between January 1, 2020, and
22 November 30, 2022, Defendants denied Plaintiff the opportunity for vigorous outdoor recreation
23 due to the conditions in the administrative segregation recreation yard. (ECF No. 5 at 5.) The

1 yard had no restrooms, and Plaintiff was not allowed to use the restroom. (*Id.*) Plaintiff was left
2 outside so long that he became weak, exhausted, dizzy, and unable to stand. (*Id.* at 6.) Due to the
3 lack of restrooms, the yard was almost always contaminated with urine, leaving Plaintiff
4 nowhere to exercise. (*Id.* at 6.) The drinking containers in the yard were never cleaned and
5 therefore were contaminated with mold and mildew; Plaintiff was forced to drink the moldy
6 water because he was left outside for so long. (*Id.* at 6.) Plaintiff, who has end-stage renal disease
7 and is hemo-dialysis dependent via perma-catheter, was not allowed to bring his walker into the
8 yard. (*Id.* at 5-6.) Plaintiff was forced to stand in the yard painfully for six hours, and he
9 frequently passed out due to the conditions in the cage. (*Id.* at 6.) The defendants refused to
10 provide Plaintiff reasonable accommodations for outdoor exercise by refusing to provide clean
11 drinking water, access to restroom facilities, and ADA-compliant recreation cages. (*Id.* at 7.)

12 Defendants have moved for summary judgment, arguing, among other things, that
13 Plaintiff failed to exhaust his administrative remedies. After a thorough review, it is
14 recommended that Defendants' motion be granted.

15 II. LEGAL STANDARD

16 The legal standard governing this motion is well settled: a party is entitled to summary
17 judgment when "the movant shows that there is no genuine issue as to any material fact and the
18 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
19 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the
20 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
21 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome
22 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary
23 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the

1 other hand, where reasonable minds could differ on the material facts at issue, summary
 2 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

3 “The purpose of summary judgment is to avoid unnecessary trials when there is no
 4 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
 5 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
 6 of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*,
 7 477 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided
 8 that one party must prevail as a matter of law”). In considering a motion for summary judgment,
 9 all reasonable inferences are drawn in the light most favorable to the non-moving party. *In re
 10 Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach
 11 & Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the
 12 nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*,
 13 477 U.S. at 249-250 (citations omitted). The court’s function is not to weigh the evidence and
 14 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
 15 *Anderson*, 477 U.S. at 249.

16 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
 17 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
 18 come forward with evidence which would entitle it to a directed verdict if the evidence went
 19 uncontested at trial.’ … In such a case, the moving party has the initial burden of establishing
 20 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.
 21 Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
 22 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
 23 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate

1 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
 2 party cannot establish an element essential to that party's case on which that party will have the
 3 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

4 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
 5 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
 6 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
 7 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute
 8 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."

9 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)
 10 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
 11 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
 12 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
 13 pleadings and set forth specific facts by producing competent evidence that shows a genuine
 14 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

15 III. DISCUSSION

16 A. Preliminary Matters

17 As a preliminary matter, Defendants argue Plaintiff's opposition was untimely filed and
 18 exceeds the 30-page limit set by LR 7-3(a). The court is not persuaded that the opposition should
 19 be stricken on either ground, as it is clear from the record that summary judgment should be
 20 granted, even after considering Plaintiff's lengthy and untimely opposition.

21 Defendants also object to the authenticity of Plaintiff's exhibits, including several
 22 declarations filed without a signature. The court need not reach this issue, because even
 23 assuming the authenticity of Plaintiff's exhibits, summary judgment should be granted. However,

1 Plaintiff's "exhibits" are replete with additional argument, and that additional argument the court
 2 does not consider.

3 **B. Exhaustion**

4 **1. Standard**

5 The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought
 6 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a
 7 prisoner confined in any jail, prison, or other correctional facility until such administrative
 8 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement thus
 9 applies to all of Plaintiff's claims in this case. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d
 10 1056, 1061–62 (9th Cir. 2007) (. An inmate must exhaust his administrative remedies
 11 irrespective of the forms of relief sought and offered through administrative avenues. *Booth v.*
 12 *Churner*, 532 U.S. 731, 741 (2001).

13 The failure to exhaust administrative remedies is ““an affirmative defense the defendant
 14 must plead and prove.”” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v.*
 15 *Bock*, 549 U.S. 199, 204, 216 (2007)). “If undisputed evidence viewed in the light most
 16 favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment
 17 under Rule 56. If material facts are disputed, summary judgment should be denied, and the
 18 district judge rather than a jury should determine the facts [in a preliminary proceeding].” *Id.* at
 19 1168, 1170-71 (citations omitted).

20 Once a defendant shows the plaintiff did not exhaust available administrative remedies,
 21 the burden shifts to the plaintiff “to come forward with evidence showing that there is something
 22 in his particular case that made the existing and generally available administrative remedies
 23 effectively unavailable to him.” *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 778

1 n. 5 (9th Cir. 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate plaintiff
 2 did not meet his burden when he failed to identify any actions prison staff took that impeded his
 3 ability to exhaust his administrative remedies, or otherwise explain why he failed to comply with
 4 the administrative remedies process). The ultimate burden of proof, however, remains with the
 5 defendant. *Id.*

6 Exhaustion cannot be satisfied by filing an untimely or otherwise procedurally infirm
 7 grievance, but rather, the PLRA requires “proper exhaustion.” *Woodford v. Ngo*, 548 U.S. 81, 89
 8 (2006). “Proper exhaustion” refers to “using all steps the agency holds out, and doing so
 9 properly (so that the agency addresses the issues on the merits).” *Id.* (emphasis in original)
 10 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, “[s]ection 1997e(a)
 11 requires an inmate not only to pursue every available step of the prison grievance process but
 12 also to adhere to the ‘critical procedural rules’ of that process.” *Reyes v. Smith*, 810 F.3d 654,
 13 657 (9th Cir. 2016) (quoting *Woodford*, 548 U.S. at 90). “[I]t is the prison’s requirements, and
 14 not the PLRA, that define the boundaries of proper exhaustion.” *Jones v. Bock*, 549 U.S. at 218.

15 An inmate need only exhaust “available” administrative remedies. See *Ross v. Blake*, 578
 16 U.S. 632, 641 (2016). “[A]n inmate is required to exhaust those, but only those, grievance
 17 procedures that are ‘capable of use’ to obtain ‘some relief for the action complained of.’” *Id.*
 18 (quoting *Booth*, 532 U.S. at 738).

19 **2. NDOC’s Exhaustion Procedure**

20 To exhaust administrative remedies within NDOC, inmates must utilize the inmate
 21 grievance process which is set forth in NDOC’s Administrative Regulation (AR) 740. The
 22 inmate must proceed through three levels for a grievance to be considered exhausted—informal,
 23

1 first, and second levels. (ECF Nos. 35-3 (AR 740 effective Apr. 22, 2022), 35-4 (AR 740
2 effective Apr. 28, 2022), 45-3 (AR 740 effective Nov. 20, 2018).)

3 Defendants argue that only one of the many grievances Plaintiff has filed could have
4 potentially exhausted the claims in this case: Grievance No. 2006-31-31996. (ECF No. 35-5 at
5 139-40; ECF No. 45-1.) In Grievance No. 2006-31-31996, Plaintiff asserted that the recreation
6 yards were not ADA-compliant due to the lack of restrooms and absence of staff to notify of
7 medical emergencies. (ECF No. 45-1 at 3.) After receiving a response at the informal level,
8 Plaintiff appealed to the first level. (*Id.* at 2, 5.) Plaintiff's initial first-level grievance was not
9 accepted, so Plaintiff filed a second first-level grievance. (*Id.* at 4, 7.) Plaintiff's second first-
10 level grievance was denied. (*Id.* at 6.) No appeal of Grievance No. 2006-31-31996 to the second
11 level appears on the record. (See ECF No. 35-5 at 139-40; ECF No. 45-1.)

12 In opposition, Plaintiff asserts many alleged irregularities with the grievance process at
13 NDOC, but none of his arguments pertains specifically to Grievance 2006-31-31996 or explains
14 why he could not exhaust it. While he claims the law library often provided only outdated copies
15 of AR 740 -- creating a trap for the unwary as he could not know what the current rules were --
16 Plaintiff does not explain how, *in this case*, that impacted his ability to exhaust. Accordingly, the
17 record clearly demonstrates that Plaintiff did not exhaust Grievance No. 2006-31-31996, and
18 Plaintiff fails to explain how the grievance process was effectively unavailable for him to do so.
19 Grievance No. 2006-31-31996 thus did not serve to exhaust the claims in this action.

20 Plaintiff's opposition and attached summary of exhibits point to numerous other
21 grievances Plaintiff has filed over time, but only one arguably relates to the claims in this case:
22 Grievance No. 2006-31-43640. In that grievance, Plaintiff complained that a prison doctor and
23 nurse (neither of whom are defendants in this case) violated his Eighth Amendment rights by

1 giving him a medical order for a walker that was for only going to and from dialysis, and
2 refusing to order him a walker that could be used in the yard. (ECF No. 45-6 at 14-17.) As a
3 result, the grievance further stated, Plaintiff had to stand in the yard for six hours at a time in
4 great pain. (*Id.* at 16.)

5 A grievance suffices to exhaust a claim if it puts the prison on adequate notice of the
6 problem for which the prisoner seeks redress.” *Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir.
7 2010); *see also Fordley v. Lizarraga*, 18 F.4th 344, 358 (9th Cir. 2021) (claims against warden
8 were not exhausted where none of the plaintiff’s “administrative filings named the warden, nor
9 did they describe the warden taking, or failing to take, actions that deprived [plaintiff] of any
10 federally guaranteed right.”).

11 Plaintiff’s opposition spends a great deal of time arguing about the walker, and where he
12 was allowed to use it. However, such allegations about his walker are not the basis for the
13 complaint in this case. The complaint here relates to the conditions and lack of accommodations
14 in the recreation yard, including Plaintiff’s inability to use a walker therein. But Grievance No.
15 2006-31-43640 does not allege that any prison policy or any actions or omissions by the named
16 defendants precluded his use of the walker in the yard. Rather, it alleges that Plaintiff could not
17 bring a walker in the yard because medical staff would not let him have a walker that could be
18 used in the yard. Nothing in Grievance No. 2006-31-43640 would have put the prison on notice
19 that Plaintiff was complaining of the conditions in the yard or of failures of the named
20 defendants that led to a violation of his rights. Because Plaintiff’s claims in this case relate to the
21 conditions in the yard, the court concludes that Grievance No 2006-31-43640 did not exhaust the
22 claims in this case.

23

1 No other exhausted grievance in the 153-page grievance log appears to relate to the
2 claims in this case. (*See* ECF No. 35-5.) Plaintiff has identified no other relevant grievance.
3 Accordingly, as Defendants have presented evidence demonstrating that Plaintiff did not exhaust
4 his claims in this action, summary judgment should be granted for failure to exhaust.

5 **V. CONCLUSION**

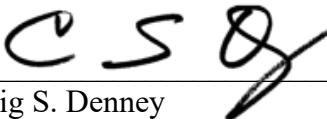
6 IT IS HEREBY RECOMMENDED that the District Judge enter an order GRANTING
7 the motion for summary judgment filed by Defendants (ECF No. 35).

8 The parties should be aware of the following:

9 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
10 this Report and Recommendation within fourteen days of being served with a copy of the Report
11 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
12 Report and Recommendation” and should be accompanied by points and authorities for
13 consideration by the district judge. Failure to file a timely objection may waive the right to
14 appeal the district court’s order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

15 2. That this Report and Recommendation is not an appealable order and that any notice of
16 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
17 until entry of judgment by the district court.

18
19 Dated: July 21, 2025

20 
21 Craig S. Denney
22 United States Magistrate Judge
23